United States Department of Labor
Employees' Compensation Appeals Board

F.B., Appellant	)	
and	)	**Docket No. 17-0723**
	)	**Issued: September 26, 2017**
DEPARTMENT OF VETERANS AFFAIRS, OCCUPATIONAL HEALTH CLINIC, Gainesville, FL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 13, 2017 appellant filed a timely appeal from an October 28, 2016 merit decision and a January 26, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's entitlement to wage-loss compensation and schedule award benefits effective February 5, 2016 as she refused an offer of suitable work under section 8106(c)(2) of FECA; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board on appeal. The relevant facts of that decision are incorporated herein. The facts relevant to the current appeal are set forth below.

On May 29, 2005 appellant, then a 47-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging on May 28, 2005 she injured her right hand due to constant repositioning of a patient with feeding tubes pursuant to the physicians orders

On November 28, 2005 OWCP denied appellant's claim finding that she had failed to submit sufficient evidence to establish a diagnosed condition due to the accepted employment incident. Appellant, through counsel, requested reconsideration on December 1, 2005. By decision dated January 17, 2006, OWCP found that she had not established a causal relationship between her bilateral wrist conditions and her employment. Counsel requested reconsideration. By decision dated June 20, 2006, OWCP denied modification of its prior decision.[2] By Order Remanding Case, dated October 31, 2006,[3] the Board remanded appellant's claim to OWCP for reassemblage of the record and issuance of an appropriate decision.[4]

In a decision dated November 3, 2006, OWCP found that appellant had not submitted sufficient medical evidence to establish a causal relationship between her accepted employment activities on May 28, 2005 and her right wrist condition. Counsel appealed to the Board. In its August 6, 2007 decision, the Board affirmed this decision.[5]

Counsel requested reconsideration on August 5, 2008. On October 23, 2008 OWCP accepted appellant's claim for right wrist strain, but found that she had no disability due to this condition after August 18, 2005. On February 23, 2009 it accepted the additional condition of volar intercalated segmental instability (VISI) deformity of the right wrist secondary to ligament injury. On September 15, 2009 counsel requested that a diagnosed emotional condition be accepted as causally related to her work injury. OWCP denied this request in a January 22, 2010 decision. After counsel requested an oral hearing, in a March 16, 2010 decision, an OWCP hearing representative found that the issue was not in posture for a decision and remanded the claim for further development by OWCP.

OWCP accepted appellant's claim for a temporary aggravation of depression for the period May 28, 2005 through October 5, 2010. In a decision dated March 29, 2011, it terminated medical and wage-loss benefits for her mental condition effective October 5, 2010. OWCP noted that benefits for other accepted conditions were not terminated. Following counsel's request for an oral hearing, on January 11, 2012 OWCP's hearing representative affirmed the March 29, 2011 decision. Appellant elected FECA benefits from December 16, 2005 through October 6, 2010 rather than disability retirement benefits. On February 20, 2012 counsel filed on

[2] This decision, however, was not in the record at the time of appellant's initial appeal to the Board.

[3] *Order Remanding Case*, Docket No. 06-1740 (issued October 31, 2006).

[4] On September 27, 2006 the Office of Personnel Management granted appellant disability retirement.

[5] Docket No. 07-0502 (issued August 6, 2007).

her behalf claims for compensation (Form CA-7) for the period beginning October 6, 2010. By decision dated April 6, 2012, OWCP paid wage-loss benefits beginning October 6, 2010. It thereafter placed appellant on the periodic compensation rolls.

Dr. Roger D. Powell, a Board-certified orthopedic surgeon, examined appellant on December 1, 2008 and opined that she was not capable of pulling and pushing heavy patients due to her wrist condition. He also reported that she had chronic pain due to a herniated disc and bipolar personality disorder. Dr. Powell found that appellant could use her right hand, but could not lift patients. He completed a work capacity evaluation on April 14, 2014 and indicated that she could not perform her usual job and could not work eight hours a day, but could work in a limited-duty position.

In a note dated April 14, 2014, Dr. Powell noted that appellant had experienced several nonemployment-related illnesses including cancer. He diagnosed right wrist injury. Dr. Powell found limited range of motion, mild tenderness over the distal radius, and minimal swelling. He completed an additional work capacity evaluation and again found that appellant could not work. Dr. Powell indicated that his restrictions were permanent. He noted that appellant could not reach for more than one hour, could not reach above the shoulder on the right, and restricted her repetitive movements of her wrists to 15 minutes within an hour. Dr. Powell further restricted her pushing and pulling to five pounds on the right side and indicated that she could not climb ladders.

Dr. Powell completed another report on April 28, 2014 and noted appellant's ongoing right wrist conditions. He diagnosed extensor carpi ulnaris (ECU) tenosynovitis. Dr. Powell indicated that appellant had difficulty with heavy lifting and would be unable to lift 50 pounds. He found that she could stand eight hours a day, sit eight hours a day, and walk intermittently for eight hours a day. Dr. Powell reported that appellant could not kneel, bend, or stoop as she could not push up on the right wrist. He found that she could not push or pull for eight hours a day, but could climb stairs intermittently. On April 28, 2014 Dr. Powell examined appellant due to pain on the ulnar aspect of her right wrist and provided a cortisone injection. He provided a second injection on May 28, 2014 due to her moderate discomfort from ECU tenosynovitis.

In November 14 and December 1, 2014 notes, Dr. James W. Berk, Board-certified in family and sports medicines, diagnosed lumbar degenerative disc disease with facet arthropathy. He noted that appellant reported chronic low back pain with moderate-to-severe pain in the low back. Dr. Berk listed the additional conditions of lung cancer and history of chronic pain syndrome. He examined appellant and found that she was able to get up from a seated position without difficulty. Dr. Berk diagnosed L5-S1 facet arthropathy and spinal stenosis L4-5.

On January 8, 2015 the employing establishment offered appellant a permanent full-time position as an information receptionist. This position required lifting up to five pounds, sitting up to eight hours a day, standing and walking up to one hour intermittently, and intermittent reaching above the shoulder and fine manipulation.

Appellant refused the job offer on February 3, 2015 and asserted that she had developed additional conditions which prevented her from returning to work. These alleged new conditions included lumbar degenerative disc disease with severe facet arthrosis L5-S1. Appellant alleged

that she was not capable of sitting for long periods of time, walking long distances, and driving two hours to and from the employing establishment. She noted that she was receiving treatment for kidney stones and had been diagnosed with lung cancer which required periodic treatment.

Dr. Powell completed a duty status report on November 17, 2014 and indicated that appellant could perform the duties of an information receptionist.

On June 16, 2015 OWCP referred appellant, a statement of accepted facts, and list of questions for a second opinion evaluation with Dr. George C. Hochreiter, an osteopath.

Dr. Powell completed a work capacity evaluation on June 29, 2015 and provided restrictions for appellant's right hand only. He found that appellant could reach above the shoulder for one hour a day and that she could perform repetitive movements of the wrists for one hour. Dr. Powell also restricted appellant's repetitive pushing of the right hand. He noted that she required a 10-minute break every hour. Dr. Powell reported that appellant underwent back surgery on May 17, 2015 with additional required restrictions. He completed a note on June 29, 2015 and again diagnosed ECU tenosynovitis and ulnar wrist pain on the right. Dr. Powell opined that appellant could work light duty with no long-term repetitive motion and no lifting more than 10 pounds on the right. He found that she would require frequent breaks.

On June 30, 2015 appellant asserted that it would be difficult for her to travel more than 60 miles to the second opinion examination due to her recent back surgery which had occurred on May 17, 2015. She requested a second opinion examination with a physician closer to her residence. OWCP scheduled an additional appointment with Dr. Hochreiter on August 10, 2015.

In a report dated September 16, 2015, Dr. Hochreiter diagnosed postoperative ulnar shortening and four corner fusion of the right wrist with persistent discomfort. He found that appellant had continuing symptoms of her right wrist condition including tenderness to palpation and mildly limited motion. Dr. Hochreiter opined that these conditions were causally related to the accepted employment injury. He found that appellant was not totally disabled, but did have right wrist limitations with pinching grip. Dr. Hochreiter also noted that she had other limitations because of her back. He indicated that appellant would be restricted with lifting, pushing, and pulling. Dr. Hochreiter found that she could lift up to 30 pounds rarely, 20 pounds occasionally, and 15 pounds frequently. He determined that appellant could lift 20 pounds up to three hours in an eight-hour day. Dr. Hochreiter opined that appellant could push and pull 40 pounds up to three hours in an eight-hour day. He completed the work capacity evaluation with these restrictions and noted that she could work eight hours a day at the light strength level.

On October 30, 2015 the employing establishment again offered appellant the position of information receptionist at the Lake City Veteran Affairs Medical Center. Appellant's tour of duty would be from 8:00 a.m. to 4:30 p.m. or eight hours a day. The position was classified as sedentary with eight hours of sitting, although she was free to stand or change positions as frequently as needed. The position could infrequently require lifting file folders up to one pound in weight, but no pushing, pulling, squatting, reaching, or reaching above the shoulder was required. The duties were welcoming visitors by greeting them in person or on the telephone, answering or referring inquiries from visitors and staff, and directing visitors to the clinic areas. The position did not require use of the fax or copy machine, computer skills, or typing work.

In a letter dated November 5, 2015, appellant noted that she had a subsequently arising back condition and noted difficulty in making the drive from her home to the employing establishment. By letter dated November 9, 2015, the employing establishment addressed her concerns noting that the offered position was sedentary, and required lifting only up to one pound. It noted no pushing, pulling, squatting, reaching, or reaching above the shoulders was required. The employing establishment also reported that, based on computer calculations, it was located 33 miles from appellant's home.

On November 17, 2015 OWCP informed appellant that the offered position of receptionist was suitable based on the medical evidence. It also noted that the position remained available. OWCP reviewed appellant's listed concerns and noted that the lifting requirements of the position were within the restrictions imposed by both Drs. Powell and Hochreiter. OWCP further noted that she was capable of working eight hours a day in accordance to both physicians. It addressed appellant's alleged additional medical conditions and noted that there was no medical evidence of record supporting her inability to perform the offered position due to these conditions. OWCP afforded her 30 days to accept the position or offer her written reasons for refusal.

On December 11, 2015 appellant provided additional medical evidence in support of her claim of limitations on sitting and driving. Dr. Laurel Ann Warwicke, a physician Board-certified in radiation oncology, examined appellant on October 5, 2012 and diagnosed poorly differentiated squamous cell carcinoma in the lung or stage IIIA nonsmall cell lung cancer. She recommended chemotherapy.

On September 8, 2015 Dr. Prathima Reddy, a Board-certified physiatrist, examined appellant due to severe low back pain following a motor vehicle accident which had occurred in 2006. She found limited range of motion in the lumbar spine and diagnosed degenerative lumbar intervertebral disc and post-laminectomy syndrome in the lumbar area. Dr. Reddy noted that appellant had a lumbar decompression with fusion at L4-5, and that appellant had persistent lower back pain due to L5-S1 degenerative disc and facet arthritis.

Appellant submitted a November 11, 2015 chest computerized tomography scan which demonstrated no evidence of lung cancer recurrence or metastasis. She also submitted a November 17, 2015 note from a nurse practitioner.

Dr. Robert G. Valentine, a pain management physician, examined appellant on December 1, 2015 due to low back pain. He diagnosed lumbosacral spondylosis, degenerative lumbar intervertebral disc, post-laminectomy syndrome, and diabetes.

In a letter dated January 14, 2016, OWCP informed appellant that it found the offered position of receptionist suitable on November 17, 2015 and had afforded her 30 days to accept the position or provide her reasons for refusal. It reviewed the evidence submitted since the November 17, 2015 letter and found that it did not address her disability for work in the offered position of receptionist due to any diagnosed condition. OWCP informed appellant that the evidence submitted did not establish that the offered position was not suitable work. It afforded her an additional 15 days to accept the offered position and noted that if she refused the position her entitlement to wage-loss compensation and schedule award benefits would be terminated.

Appellant responded on January 20, 2016 and noted that the records she submitted were not exhaustive. She asserted that she was not asked to provide records that specifically addressed her inability to perform the offered position. Appellant noted that on January 6, 2016 she underwent a nerve ablation on her lower back and that Dr. Rosario suspected bone spurs. She contended that there were other factors that affected her wage-earning capacity. On January 31, 2016 appellant again alleged that OWCP was ignoring her other medical conditions in finding the receptionist position suitable work. She alleged additional conditions including the inability to see at night, social phobia and anxiety, limitations due to her back pain, drowsiness due to medications, and heel spurs. Appellant asserted that OWCP had an obligation to develop the medical evidence to determine all her work restrictions including nonwork-related conditions.

By decision dated February 4, 2016, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits effective February 5, 2016 as she had refused suitable work in accordance with 5 U.S.C. § 8106(c)(2). It noted that the decision did not affect coverage of her medical benefits which were still authorized if needed to treat her accepted work-related conditions.[6]

Appellant requested an oral hearing on February 18, 2016. She argued that her benefits were wrongly terminated as OWCP did not consider her work restrictions due to her back injury. In a note dated February 17, 2016, Dr. Valentine found that appellant had a great deal of low back pain which severely limited her activities and her ability to sit. He noted that she was unable to sit longer than an hour without having to lie down to relieve her back pain. Appellant also submitted notes from a physical therapist.

Dr. Paul W. Snider, a physician Board-certified in emergency medicine, examined appellant on October 9, 2006 due to progressive low back pain. He diagnosed lumbar strain. Appellant underwent a lumbar epidural injection on May 12, 2007. She underwent a lumbar magnetic resonance imaging (MRI) scan on May 14, 2007. Dr. Steven A. Reid, a Board-certified neurosurgeon, examined appellant on July 16, 2007 following a September 20, 2006 motor vehicle accident when a sport utility vehicle backed into the passenger door of appellant's car. He reviewed a May 14, 2007 lumbar MRI scan which showed a central and left paracentral disc protrusion at the L5-S1 level with posterior displacement of the descending S1 nerve root. Appellant reported increased symptoms when sitting or walking. On December 4, 2007 Dr. Reid recommended an L5-S1 microsurgical hemilaminotomies with discectomy.

In a letter dated March 2, 20016, appellant changed her request for an oral hearing to a request for a review of the written record. In a June 30, 2016 decision, a hearing representative found that there was no medical evidence of record supporting her disability for work in the offered receptionist position and affirmed the December 4, 2016 decision.

On October 11, 2016 appellant requested reconsideration and noted that she underwent a laminectomy with fusion on May 15, 2015. On October 10, 2016 Dr. Valentine diagnosed

[6] In a February 16, 2016 preliminary decision, OWCP found that appellant received a $268.33 overpayment for the period February 5 through 6, 2015 as her compensation was terminated on February 5, 2016. It administratively terminated this debt on March 24, 2016.

severe low back pain limiting activity and even sitting. He noted that the sitting issue suggested a discogenic component, compatible with her L5-S1 degenerative disc disease. Dr. Valentine diagnosed intractable lumbar pain due to degenerative disc disease L5-S1. He opined, "Sitting increases intradiscal pressure, intensifying pain in a sensitized lumbar disc. Therefore, [appellant] is unable to tolerate prolonged sitting and is restricted to sitting no more than one hour before lying down, or 30 minutes before standing. She is unable to engage in prolonged sitting. This precludes employment in a typical sedentary position unless accommodations can be made for the previously noted position changes."

By decision dated October 28, 2016, OWCP denied modification of its prior decisions. It noted that the offered position allowed appellant to stand or change positions as frequently as needed. OWCP found that there was no rationalized medical evidence supporting her claim that the offered position was not suitable.

Appellant requested reconsideration on December 9, 2016. She disagreed with OWCP's assessment of the medical evidence and alleged that she would be required to drive four hours round trip to the employing establishment.

By decision dated January 26, 2017, OWCP declined to reopen appellant's claim for consideration of the merits. It found that her letter neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

It is well settled that once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[7] As OWCP in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), OWCP must establish that she refused an offer of suitable work. Section 8106(c) of FECA[8] provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. OWCP's regulations provide that OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter the finding of suitability. If the employee presents such reasons and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that she has 15 days in which to accept the offered work without penalty.[9]

Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[10] Section 10.517(a) of FECA's implementing regulations provide that an

[7] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[8] 5 U.S.C. § 8106(c)(2).

[9] 20 C.F.R. § 10.516.

[10] *D.C.*, Docket No. 16-1665 (issued April 13, 2017); *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

employee who refuses or neglects to work after suitable work has been offered or secured, has the burden of showing that such refusal or failure to work was reasonable or justified.[11] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[12]

OWCP has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, establishing that a position has been offered within the employee's work restrictions and setting for the specific job requirements of the position.[13] It is well established that OWCP must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[14] After termination or modification of benefits clearly warranted, on the basis of the evidence, the burden for reinstating benefits shifts to the employee.[15]

ANALYSIS -- ISSUE 1

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's entitlement to wage-loss compensation and schedule award benefits effective February 5, 2016 under section 8106(c)(2) of FECA.

OWCP accepted appellant's claim for right wrist strain and VISI deformity of the right wrist secondary to ligament injury. On October 30, 2015 the employing establishment offered her a position as an information receptionist at Lake City Veteran Affairs Medical Center. The position was classified as sedentary with hours of sitting, although she was free to stand or change positions as frequently as need. The position required lifting file folders up to one pound in weight, but no pushing, pulling, squatting, reaching, or reaching above the shoulder was required. This position was within the restrictions set by both appellant's attending physician and OWCP's referral physician, Dr. Hochreiter for her right arm. However, in his September 16, 2015 report, Dr. Hochreiter noted that appellant had other limitations because of her back. Dr. Powell also noted opined on June 29, 2015 that she underwent back surgery on May 17, 2015 and that she would require additional restrictions due to her back conditions beyond those offered for her right arm.

OWCP informed appellant that the position was suitable on November 17, 2015. The Board notes, however, that the medical evidence clearly reflects that she was receiving medical treatment for a subsequently arising back condition. Dr. Hochreiter indicated that he had not reviewed the offered position prior to determining whether appellant was capable of performing the position.[16] Dr. Hochreiter and Dr. Powell had both indicated that she had additional

[11] 20 C.F.R. § 10.517(a).

[12] *Id.* at § 10.516.

[13] *See Linda Hilton,* 52 ECAB 476 (2001).

[14] *Richard P. Cortes*, 56 ECAB 200 (2004).

[15] *Talmadge Miller,* 47 ECAB 673, 679 (1996); *see also George Servetas,* 43 ECAB 424 (1992).

[16] *Y.A.*, 59 ECAB 701 (2008).

restrictions due to her back condition. OWCP's procedures provide that the claimant must be taken as a whole person. If a nonwork-related condition results in work restrictions, those must be considered. The Board finds that OWCP failed to establish a suitable work position as it did not develop the medical evidence to determine whether appellant was capable of performing the position of receptionist given her subsequently arising back condition. As a penalty provision, section 8106(c)(2) must be narrowly construed.[17] OWCP did not discharge its burden of proof to justify the termination of appellant's wage-loss compensation and schedule award benefits.[18]

CONCLUSION

The Board finds that OWCP failed to meet its burden to terminate appellant's entitlement to wage-loss compensation and schedule award benefits effective February 5, 2016 as she refused an offer of suitable work under section 8106(c)(2) of FECA.

ORDER

IT IS HEREBY ORDERED THAT January 26, 2017 and October 28, 2016 decisions of Office of Workers' Compensation Programs are reversed.

Issued: September 26, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

[17] *See Karen Spurling*, 56 ECAB 189 (2004); *Christine P. Burgess*, 43 ECAB 449 (1992).

[18] Due to the disposition of this issue, it is not necessary for the Board to address the nonmerit issue on appeal.